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MEDTRONIC, INC.			NAJARIAN, LENA	
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1                   UNITED STATES PATENT AND TRADEMARK OFFICE

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4                   BEFORE THE BOARD OF PATENT APPEALS  
5                   AND INTERFERENCES

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7  
8                   *Ex parte* JEROME T. HARTLAUB

9  
10  
11                  Appeal 2010-000291  
12                  Application 10/002,669  
13                  Technology Center 3600

14  
15  
16                  Before ANTON W. FETTING, JOSEPH A. FISCHETTI, and BIBHU R.  
17                  MOHANTY, *Administrative Patent Judges*.

18                  FETTING, *Administrative Patent Judge*.

19                   DECISION ON APPEAL<sup>1</sup>

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

1 STATEMENT OF THE CASE<sup>2</sup>

2       Jerome T. Hartlaub (Appellant) seeks review under 35 U.S.C. § 134  
3 (2002) of a final rejection of claims 12-26 and 39-48, the only claims  
4 pending in the application on appeal. We have jurisdiction over the appeal  
5 pursuant to 35 U.S.C. § 6(b) (2002).

6       The Appellant invented an automated patient scheduling system and  
7 method for implantable drug delivery devices. Specification ¶ 04.

8       An understanding of the invention can be derived from a reading of  
9 exemplary claim 12, which is reproduced below [bracketed matter and some  
10 paragraphing added].

11      12. An implantable drug delivery device for delivering at least  
12 one drug to a patient comprising in combination:

- 13       (a) at least one reservoir each containing at least one drug;
- 14       (b) a drug scheduling module for determining whether the drug  
15 should be replenished;
- 16       (c) an appointment scheduling module automatically initiated  
17 by the drug scheduling module and without scheduling input  
18 contemporaneously provided by the patient, for automatically  
19 scheduling an appointment to replenish the drug in the device;  
20 and
- 21       (d) a telemetry module providing bi-directional  
22 communications with an external device for allowing the  
23 appointment scheduling module to schedule the appointment,

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<sup>2</sup> Our decision will make reference to the Appellant's Appeal Brief ("App. Br.," filed March 24, 2009) and Reply Brief ("Reply Br.," filed August 3, 2009), and the Examiner's Answer ("Ans.," mailed June 3, 2009), and Final Rejection ("Final Rej.," mailed October 10, 2008).

wherein the drug scheduling module receives data about the implantable drug delivery device, wherein the data is selected from the group consisting of drug usage information and drug management data.

The Examiner relies upon the following prior art:

Pilarczyk	US 4,766,542	Aug. 23, 1988
Akers	US 6,112,182	Aug. 29, 2000
Cummings, Jr.	US 6,345,620 B1	Feb. 5, 2002
Mayer	US 2002/0010597 A1	Jan. 24, 2002
Lebel	US 2002/0016568 A1	Feb. 7, 2002

Claims 12-15, 17-26, 39, and 44 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Lebel and Pilarczyk.

Claims 40-41 and 45-46 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Mayer.

Claim 16 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Akers.

Claims 42-43 and 47-48 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Cummings.

## ISSUES

The issue of whether the Examiner erred in rejecting claims 12-15, 17-26, 39, and 44 under 35 U.S.C. § 103(a) as unpatentable over Lebel and Pilarczyk turns on whether Lebel and Pilarczyk describe limitation (c) and limitation (h) of claims 12 and 21 respectively.

1       The issue of whether the Examiner erred in rejecting claims 40-41 and  
2       45-46 under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and  
3       Mayer turns on whether the Appellant's arguments in support claims 12 and  
4       21 are found persuasive and whether a person with ordinary skill in the art  
5       would have been motivated to combine Lebel, Pilarczyk, and Mayer.

6       The issue of whether the Examiner erred in rejecting claim 16 under 35  
7       U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Akers turns on  
8       whether the Appellant's arguments in support claims 12 and 21 are found  
9       persuasive and whether a person with ordinary skill in the art would have  
10      been motivated to combine Lebel, Pilarczyk, and Akers.

11      The issue of whether the Examiner erred in rejecting claims 42-43 and  
12      47-48 under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and  
13      Cummings turns on whether the Appellant's arguments in support claims 12  
14      and 21 are found persuasive.

15

## 16                   FACTS PERTINENT TO THE ISSUES

17      The following enumerated Findings of Fact (FF) are believed to be  
18      supported by a preponderance of the evidence.

19      *Facts Related to the Prior Art*

20      *Lebel*

21      01. Lebel is directed to implantable infusion pumps and external  
22        devices for communicating therewith. Lebel ¶ 0002. Lebel is  
23        concerned providing a system that has enhanced operation  
24        performance and user interface capabilities. Lebel ¶ 0009. Lebel

1           describes an implantable device that records various events that  
2           stop the delivery of insulin, such as alarms or refills. Lebel ¶  
3           0180.

4           *Pilarczyk*

5           02. Pilarczyk is directed to hardware and software used in a  
6           pharmacy to automatically contact customers whose prescriptions  
7           need to be refilled. Pilarczyk 1:7-11. The system automatically  
8           telephones each customer whose prescription needs refilling.  
9           Pilarczyk 1:54-56. The system performs an ongoing review of  
10          prescription activity prior to sending information to a schedule  
11          file. Pilarczyk 6:15-17. The ongoing review is initiated by the  
12          pharmacist. Pilarczyk 6:29-30. The system calculates the refill  
13          due date based on the daily prescription activity. Pilarczyk 6:46-  
14          47. The pharmacist selects the time span over which he wishes to  
15          review the schedule file for customers he wants to contact and the  
16          time span of prescription refill due date to be notified. Pilarczyk  
17          6:61-65 and 7:29-31. Once the period of due dates to be covered  
18          is selected, the telephoning task is automatically undertaken.  
19           Pilarczyk 7:33-35. The system then places an automated call to  
20          the customer and uses a voice synthesizer to provide the customer  
21          with a refill reminder. Pilarczyk 6:40-54 and 7:11-34.

22           *Akers*

23           03. Akers is directed to data processing systems used to manage  
24          delivery of health care services. Akers 1:8-10. Akers is  
25          concerned with enabling patients to utilize supplemental

1           healthcare services. Akers 1:46-52. Akers describes a system  
2           where a pharmacist is triggered to take further action controlled by  
3           a second process when the pharmacist dispenses drugs. Akers  
4           1:53-58. Such a process includes scheduling an appointment for  
5           monitoring lifestyle, health, or disease states. Akers 2:1-8.

6           *Mayer*

7           04. Mayer is directed to computerized tools for tracking,  
8           maintaining, and managing various aspects of patients' healthcare.  
9           Mayer ¶ 0003. Mayer is concerned with providing individuals  
10          with a greater degree of control and direct involvement over one's  
11          own healthcare. Mayer ¶ 0012. Mayer describes a set of software  
12          tools that can be used by a consumer to store, maintain, and track  
13          his/her own medical data. Mayer ¶ 0013. One such tool is an  
14          appointment making tool that automatically requests appointment  
15          with physicians or health care providers and manages set  
16          appointments. Mayer ¶ 0050.

17          *Cummings*

18          05. Cummings is directed to a scheduling interface for booking  
19          appointments with a professional, such as a doctor, or a  
20          professional service, such as a medical testing service, even when  
21          scheduling details may contain sensitive or highly personal  
22          information and when the office of the professional or  
23          professional service is closed. Cummings 1:13-20. Cummings is  
24          concerned with scheduling appointments with a professional when  
25          the professional's office is unable to schedule appointments or

1 office hours are closed. Cummings 1:39-47. Cummings describes  
2 that a patient contacts a call center and the call center creates an  
3 appointment for the patient. Cummings 7:5-10. The call center  
4 accesses a master schedule database that includes all of the times  
5 that a physician is willing to accept appointments. Cummings  
6 8:1-10. The call center then sets the appointment. Cummings  
7 8:20-22.

8

9 ANALYSIS

10 *Claims 12-15, 17-26, 39, and 44 rejected under 35 U.S.C. § 103(a) as*  
11 *unpatentable over Lebel and Pilarczyk*

12 The Appellant contends that Pilarczyk fails to describe scheduling  
13 limitation (c) of claim 12 and as described in limitation (h) of claim 21.  
14 App. Br. 13-14. The Appellant specifically argues that Pilarczyk only  
15 describes that a voice synthesizer reminds the customer to refill a  
16 prescription and this is not the same as scheduling an appointment. App. Br.  
17 14. We disagree with the Appellant. Limitation (c) and limitation (h) of  
18 claims 12 and 21 require scheduling an appointment for a patient, without  
19 receiving input provided by the patient, to replenish the drug in the device.  
20 Lebel describes an implantable, telemetric device that records events, such  
21 as the need to refill insulin. FF 01. Pilarczyk describes a tool in a pharmacy  
22 that automatically contacts customers whose prescriptions need to be  
23 refilled. FF 02. Pilarczyk specifically describes that a pharmacist designates  
24 a time period for due dates to contact customers and the system  
25 automatically contacts each customer that requires a refill for a prescription.

1 FF 02. The system automatically dials the customer's phone numbers and  
2 uses a voice synthesizer to communicate to the customer to refill a drug  
3 prescription. FF 02. The Appellant agrees this is what is described by the  
4 cited prior art and contends that this notification is not the same as  
5 scheduling an appointment. App. Br. 13-14. The term "appointment"  
6 encompasses any meeting set for an understood time, place, or purpose.  
7 Here, Pilarczyk describes a communication to a customer for a meeting with  
8 a specific place, purpose, and a relatively time. Although Pilarczyk does not  
9 use the exact term "appointment," Pilarczyk does functionally describe the  
10 scheduling of an appointment. The Appellant fails to further provide any  
11 rationale as to how the teachings of Pilarczyk are functionally distinguished  
12 from scheduling an appointment. As such, the combination of Lebel and  
13 Pilarczyk describes limitations (c) and limitation (h) of claims 12 and 21.

14 The Appellant further contends that there would have been no reason for  
15 one of ordinary skill in the art to be motivated to provide an automatic  
16 scheduling module automatically initiated by a drug scheduling module.  
17 App. Br. 14-15. We disagree with the Appellant. Lebel and Pilarczyk are  
18 concerned with patient's use of prescribed medications. FF 01-02. Lebel  
19 describes a device that alarms users when a drug refill is required. FF 01.  
20 Pilarczyk also solves this problem by automatically notifying customers  
21 when a prescription may need to be refilled. FF 02. A person with ordinary  
22 skill in the art would have been motivated to combine Pilarczyk's  
23 description of notifying and scheduling the refill of a prescribed drug to  
24 Lebel's device in order for Lebel's implanted device to continue to provide  
25 medication to the patient in a prescribed manner. Lebel and Pilarczyk are  
26 concerned with the same problem and a person with ordinary skill in the art

1 would have recognized to combine their teachings and this combination  
2 would have rendered predictable results.

3

4           *Claims 40-41 and 45-46 rejected under 35 U.S.C. § 103(a) as*  
5           *unpatentable over Lebel, Pilarczyk, and Mayer*

6       The Appellant contends that Mayer fails to cure the deficiencies argued  
7       *supra* in support of claims 12 and 21. App. Br. 15. We disagree with the  
8       Appellant. The Appellant's arguments in support of claims 12 and 21 were  
9       not found persuasive *supra*, and are not found persuasive here for the same  
10      reasons.

11      The Appellant also contends that a person with ordinary skill in the art  
12      would not have been motivated to combine Lebel, Pilarczyk, and Mayer.  
13      App. Br. 16. We disagree with the Appellant. As discussed *supra*, Lebel  
14      and Pilarczyk are concerned with providing a patient with a prescribed drug.  
15      FF 01-02. Mayer is also concerned providing a patient with increased  
16      control over medical information and solves this concern by providing a tool  
17      that enables patients to have better control over their medical information.  
18      FF 04. Mayer provides a specific appointment making tool that  
19      automatically sets and manages appointments for a patient. FF 04. Such a  
20      tool increases the patient's ability to control medical appointments. A  
21      person with ordinary skill in the art would have been motivated to combine  
22      Mayer to Lebel and Pilarczyk in order to increase a patient's ability to  
23      control and manage health care appointments. As such, a person with  
24      ordinary skill in the art would have been lead to combine Lebel, Pilarczyk,  
25      and Mayer.

1

2                   *Claim 16 rejected under 35 U.S.C. § 103(a) as unpatentable over Lebel,*  
3                   *Pilarczyk, and Akers*

4 The Appellant contends that Akers fails to cure the deficiencies argued  
5 *supra* in support of claims 12 and 21. App. Br. 16. We disagree with the  
6 Appellant. The Appellant’s arguments in support of claims 12 and 21 were  
7 not found persuasive *supra*, and are not found persuasive here for the same  
8 reasons.

9        The Appellant also contends that a person with ordinary skill in the art  
10      would not have been motivated to combine Lebel, Pilarczyk, and Akers.  
11      App. Br. 16. We disagree with the Appellant. As discussed *supra*, Lebel  
12      and Pilarczyk are concerned with providing a patient with a prescribed drug.  
13      FF 01-02. Akers is also concerned with the delivery of healthcare to  
14      patients. FF 03. Akers triggers a pharmacist to provide a patient with  
15      further medical information including scheduling an appointment for  
16      monitoring lifestyle and health or diseases states or conditions. FF 03. A  
17      person with ordinary skill in the art would have been motivated to combine  
18      Akers to Lebel and Pilarczyk in order to increase the medical options for a  
19      patient and facilitate the scheduling of appointments to receive the other  
20      medical options. As such, Lebel, Pilarczyk, and Mayer are concerned with  
21      delivering healthcare to patients and scheduling appointments for healthcare  
22      and a person with ordinary skill in the art would have been lead to combine  
23      their teachings.

24

*Claims 42-43 and 47-48 rejected under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Cummings*

3 The Appellant contends that Cummings fails to cure the deficiencies  
4 argued *supra* in support of claims 12 and 21. App. Br. 16-17. We disagree  
5 with the Appellant. The Appellant’s arguments in support of claims 12 and  
6 21 were not found persuasive *supra*, and are not found persuasive here for  
7 the same reasons.

## CONCLUSIONS OF LAW

10 The Examiner did not err in rejecting claims 12-15, 17-26, 39, and 44  
11 under 35 U.S.C. § 103(a) as unpatentable over Lebel and Pilarczyk.

12 The Examiner did not err in rejecting claims 40-41 and 45-46 under 35  
13 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Mayer.

14 The Examiner did not err in rejecting claim 16 under 35 U.S.C. § 103(a)  
15 as unpatentable over Lebel, Pilarczyk, and Akers.

16 The Examiner did not err in rejecting claims 42-43 and 47-48 under 35  
17 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Cummings.

DECISION

To summarize, our decision is as follows.

21       • The rejection of claims 12-15, 17-26, 39, and 44 under 35 U.S.C.  
22           § 103(a) as unpatentable over Lebel and Pilarczyk is sustained.

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Application 10/002,669

- The rejection of claims 40-41 and 45-46 under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Mayer is sustained.
- The rejection of claim 16 under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Akers is sustained.
- The rejection of claims 42-43 and 47-48 under 35 U.S.C. § 103(a) as unpatentable over Lebel, Pilarczyk, and Cummings is sustained.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

**AFFIRMED**

mev

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